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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 161

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, and DAVY C. MANER,
Respondents,

and

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and LEE F WHITE, O. R. SMILEY, and MAMIE SMILEY,
Respondents,

and

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

C. G. SHULL, JR., and RUBY MAE SHULL, PHOEBE JO SHULL now JONES and J. B. JONES, GEORGE E. SHELTON and WYNONA A. SHELTON, HAL WELCH and JO WELCH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1968

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Choctaw and Chickasaw Nations, petitioners herein, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit

entered on the 6th day of March, 1968, in three separate cases which were companion cases and which were consolidated for argument in the Circuit Court. A petition for rehearing in each of these cases was denied on April 8, 1968.

The first of these cases is the *Choctaw Nation and Chickasaw Nation* v. *The Atchison, Topeka and Santa Fe Railway Company and Davey C. Maner.* It is numbered 9572 in the United States Court of Appeals for the Tenth Circuit. In that case the defendants moved the District Court to dismiss the plaintiffs' petition. The Circuit Court of Appeals affirmed that order of the District Court.

The second of these cases is *Choctaw Nation and Chickasaw Nation* v. *St. Louis-San Francisco Railway Company, Lee F. White, O. R. Smiley and Mamie Smiley.* It is numbered 9573 in the United States Circuit Court of Appeals for the Tenth Circuit. In that case the defendants moved for summary judgment. The District Court sustained the motion. The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court.

The third of these cases is *Choctaw Nation and Chickasaw Nation* v. *C. G. Shull, Jr., Ruby Mae Shull, Phoebe Jo Shull now Jones and J. B. Jones, George E. Shelton and Wynona A. Shelton, Hal Welch and Jo Welch.* It is numbered 9574 in the United States Court of Appeals for the Tenth Circuit. In that case the defendants moved the court for summary judgment. The District Court sustained the motion. The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit in each of these cases was entered on March 6, 1968. In each of these cases petitions for rehearing were duly filed and were denied on April 8, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Does the United States under its authority as guardian of a dependent Indian tribe have the power to give lands the fee simple title to which is vested in the Indian tribe to others without rendering or assuming an obligation to render just compensation for them.

STATUTE INVOLVED

The statute involved is the second proviso to Section 14 of the Act of April 6, 1906 (34 Stat. 137), which reads:

> "Provided further, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title

thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality."

STATEMENT OF FACTS

The Choctaw Nation and Chickasaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, et al., involves approximately 200 acres of land. The Choctaw Nation and Chickasaw Nation v. St. Louis-San Francisco Railway Company, et al., involves approximately 32 acres of land. The Choctaw Nation and the Chickasaw Nation v. C. G. Shull, Jr., et al., involves approximately 40 acres of land. All of these tracts are among the lands ceded to the Choctaw Nation by the United States by the Treaty of Doaks Stand of April 18, 1820, and conveyed to it by patent dated March 23, 1842.

The Act of March 3, 1893,[1] created the Dawes Commission for the purpose of negotiating with the Choctaw and Chickasaw Tribes for the allotment of the tribal land in severalty. In 1897 that commission and the representatives from the Choctaw Nation and the Chickasaw Nation made what is known as the Atoka Agreement. This agreement provided among other things for the allotment in severalty of tribal lands to individual members of the tribe. The Atoka Agreement was incorporated into the Act of June 28, 1898,[2] called the Curtis Act.

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[1] 27 Stat. 645.

[2] 30 Stat. 505.

On February 28, 1902, the Congress enacted what is commonly referred to as the Enid and Anadarko Act.[3] It provided for the acquisition of railroad rights-of-ways across these tribal lands. Section 14 of that Act provides in part:

> "And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purpose * * *."

In 1903 the Atchison, Topeka and Santa Fe Railway Company acquired an easement for reservoir purposes on approximately 200 acres which is the subject matter of Choctaw Nation and Chickasaw Nation v. Atchison, Topeka and Santa Fe Railway Company, et al.

In 1902 the St. Louis-San Francisco Railway Company acquired an easement for reservoir purposes on approximately 40 acres which is the subject matter of Choctaw Nation and Chickasaw Nation v. C. G. Shull, Jr., et al. Also in 1902 the St. Louis-San Francisco Railway Company acquired an easement for reservoir purposes on approximately 32 acres which is the subject matter of Choctaw Nation and Chickasaw Nation v. St. Louis-San Francisco Railway Company, et al.

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[3] 7 Stat. 210.

In April 6, 1906, Congress passed an Act[4] to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian territory." The Choctaw Nation and the Chickasaw Nation are two of the Five Civilized Tribes. The second Proviso to Section 14 of that Act gives the title of the Choctaw Nation and the Chickasaw Nation in abandoned reservoirs to abutting landowners. The Act makes no provision for the payment of just compensation to the tribes.

Subsequent to the Act of April 6, 1906, the railroads abandoned the use of those three tracts.

The Choctaw Nation and the Chickasaw Nation contend that Section 14 violates the Fifth Amendment to the Federal Constitution to the extent that it attempts to take from them lands which belonged to them in fee simple and to give those lands to abutting land owners without the payment of just compensation to the tribes.

The Decision of the Court Below.

In its opinion, the court below said that it had repeatedly given effect to the second proviso and upheld the vesture of title in accordance therewith. It referred specifically to its decision in *United States* v. *Magnolia Petroleum Co.*, 110 F.2d 212, and to its decision in *United States* v. *Drumb*, 152 F.2d 821. The court below noted that the appellants had attacked those decisions on the grounds that they misconstrued the holdings of this Court in *Missouri, K. & T. Ry.* v. *Roberts*, 152 U.S. 114, and *Buttz* v.

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[4] 32 Stat. 47.

Northern Pac. R.R., 119 U.S. 55. Those cases related to situations where the tribes had only a right of occupancy, the fee being vested in the Government. In the three cases at bar the fee title to the lands involved was vested in the Choctaw Nation and the Chickasaw Nation, the Government owning no title or right of occupancy except as might flow from its fiduciary relation to the Choctaw and Chickasaw Nations. The court below said that as to the power of Congress to give tribal lands to abutting land owners, it could not see where the fee title was vested in the tribes. The court below construed this Court's decision in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281, as striking down any such distinction saying that there this Court has said: "No case in this court has ever held that taking of Indian title or use by Congress required compensation."

In its opinion the court below also noted that it was the contention of the tribes that it was the intent of the second proviso to dispose only of narrow strips and gores and not to dispose of larger tracts such as we have here. The court below said: "The argument runs contrary to the language of the statute. * * * The second proviso says nothing about the size of the easement taken. We take it that Congress intended to include all railroad easements."

Finally the court below said: "A nullification of the second proviso on the Fifth Amendment ground here asserted would be a substantial detriment to the Indian allottees and their successors in interest. The efforts of Congress to effectuate the principles of the Atoka Agreement would be severely affected.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with U. S. v. Creek Nation, 295 U.S. 103, 109, 110, 79 L.Ed. 1331, 1335, 1336, 55 S.Ct. 581 (1934); U. S. v. Shoshone Tribe, 304 U.S. 111, 116, 82 L.Ed. 1213, 1218 (1938); Northwestern Shoshone Indians v. United States, 324 U.S. 334, 340, 89 L.Ed. 985, 990 (1945); and Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277, 278, 99 L.Ed. 314, 319 (1955).

In *U. S. v. Creek Nation,* 295 U.S. 103, 109, 110, 79 L.Ed. 1331, 1335, 1336, 55 Sup.Ct. 581 (1934), in an opinion delivered by Mr. Justice Van Devanter, this Court said:

> "A question is raised as to whether there was an appropriation or taking of the lands by the United States.
>
> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of the government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. *It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'* Lane v. Santa Rosa, 249 U.S. 110, 113, 63 L.Ed. 504, 506, 39 S. Ct. 185; Cherokee Nation v. Hitchcock, 187 U.S. 294, 307, 308, 47 L.ed. 183, 190, 23 S.Ct. 115." (Emphasis supplied.)

U. S. v. *Shoshone Tribe*, 304 U.S. 111, 116, 82 L.Ed. 1213, 1218 (1938), was an action brought by the Shoshone Tribe to recover the value of part of its reservation taken by the United States by putting upon it, without the tribe's consent, a band of Arapahoe Indians. The Court said that the purpose of the treaty was that the Shoshone should have their permanent dwelling in an identified district of the country. To that end the United States had granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. The Court observed that the words of the grant coupled with the government agreement to exclude strangers, negatived the idea that the United States retained beneficial ownership. The Court also said that the grant of right to members of the tribe severally to select and hold tracts on which to establish homes for themselves and families, and the restraint upon cession of land held in common or individually, suggested beneficial ownership in the tribe. The Court observed that the cession in 1904 by the tribe to the United States in trust reflects a construction by the tribe and the Government that supported the tribe's claim of ownership, for said the Court, if the tribe "did not own, a creation of trust to sell or lease for its benefits would have been unnecessary and inconsistent with the rights of the parties." The Court said at 82 L.Ed. 1218 that "for all practical purposes the tribe owned the land."

Mr. Justice Butler speaking for the Court said, at 304 U.S. 115, 116, 82 L.Ed. 1218, that even though the United States had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or appropriate to its own use any part of the land without rendering or assuming the obligation to

pay just compensation to the tribe, "*for that would be, not the exercise of guardianship or management, but confiscation.*" (Emphasis supplied.)

In *Northwestern Shoshone Indians* v. *United States*, 324 U.S. 335, 340, 89 L.Ed. 985, 990 (1945), the Indian tribe sued the United States for the taking of lands held by the tribe by aboriginal and immemorial title. The tribe alleged that the United States had recognized its title by the Treaty at Box Elder. The Court said:

> "The decisive question in this case is whether it was intended by the Northwestern Shoshone or Box Elder Treaty of July 30, 1963, to recognize or acknowledge by implication the Indian title to the lands mentioned in that treaty. United States v. Santa Fe R. R. Co., 314 U. S. 339, 347, 86 L.ed 260, 270, 62 S. Ct. 248. *From such recognition or acknowledgment by this treaty would flow a right of occupancy which would be compensable under the jurisdictional act.*"

The Court, speaking through Mr. Justice Reed in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277, 278, 99 L.Ed. 314, 319 (1955), said:

> "Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. Citing United States v. Creek Nation, 295 US 103, 109, 110, 79 L.ed 1331, 1335, 1336, 55 S. Ct. 681; Shoshone Tribe v. United States, 299 US 475, 497, 81 L.Ed 360, 369, 57 S. Ct. 244; Chippewa Indians v. United States, 301 US 358, 375, 376, 81 L.ed. 1156, 1166, 1167, 57 S. Ct. 826; United States v. Klamath & M. Tribes, 304 US 119, 82 L.ed 1219, 58 S. Ct. 799; Sioux Tribe v. United States, 316 US 317, 326, 86 L.ed. 1501, 1507, 62 S. Ct. 1095."

The court below misconstrued Tee-Hit-Ton Indians v. United States.

In *Tee-Hit-Ton Indians* the tribe contended that the sale of the tribal land constituted a compensable taking by the United States of a portion of its proprietary interest in the land. The case turned on whether the United States had ever recognized any legal interest of the tribe in the land. The tribe asserted that when Russia took Alaska the tribe had a well developed social order which included a concept of tribal ownership; that Russia, while it possessed Alaska, in no manner interfered with the tribal claim to the land and that Congress had by subsequent acts recognized the proprietary interest of the tribe in the land. The Government contended that the Congress had never recognized any legal interest of the tribe in the land and therefore without such recognition no compensation was due the tribe by any taking by the United States.

The distinction between the facts in *Tee-Hit-Ton Indians* v. *United States* and these three cases at bar is readily apparent. The United States has always recognized the ownership of the Choctaw Nation and the Chickasaw Nation in the subject property and the court below so agreed, saying: "By virtue of the 1820 Treaty of Doaks Stand and the 1830 Treaty of Dancing Rabbit Creek the Choctaw Nation acquired from the United States in fee simple a large area of land in what is now the State of Oklahoma. The Chickasaw Nation later secured a one-fourth interest in the area which embraces the land in suit."

By the Treaty at Doaksville in 1837 (11 Stat. 573) between the Choctaw Nation and the Chicksaw Nation, the

Government recognized the ownership of the Choctaw Nation in the land ceded to them by the Treaty at Dancing Rabbit Creek.

The patent of March 23, 1842 recites that by the treaty began and held at Dancing Rabbit Creek on the 15th day of September, 1830, the United States covenanted that it would cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River ". . . in fee simple to them and their descendants . . ." and that ". . . in the execution of the agreement and stipulations in the aforesaid treaty . . ." United States of America ". . . by these Presents Do Give and Grant, unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi' to Have and to Hold the same . . . in fee simple to them and their descendants. . . ."

By the Treaty at Washington on June 22, 1855 (11 Stat. 611) the Government again recognized the ownership of the Choctaw and Chickasaw Nations in the subject property.

Again by the treaty between the United States and the Choctaw and Chickasaw Nations concluded in the City of Washington on April 28, 1866 (11 Stat. 769) the United States recognized the ownership of the Choctaw and Chickasaw Nations in the subject property.

And the Government again recognized the ownership of the Choctaw and Chickasaw Nations in the subject lands by the Act of March 3, 1893 (27 Stat. 645) which created a commission for the purpose of inducing Choctaw and Chickasaw Nations (as well as the other members of the Five Civilized Tribes) to relinquish tribal ownership and to accept allotment of the lands in severalty.

By the Treaty concluded at Atoka, Indian Territory, on the 23rd day of April, 1897, commonly known as the "Atoka Agreement" (32 Stat. 1048), the Government again recognized the ownership of the Choctaw and Chickasaw Nations in the subject property.

And the Government did so again on June 28, 1898 by the commonly called "Curtis Bill" (30 Stat. 495).

It do so again in 1902 by the Choctaw-Chickasaw Supplemental Agreement (32 Stat. 64).

It did so again by the Act of April 26, 1906 (34 Stat. 137) under Section 14 on which the appellees base their claim.

The Government's recognition of the Choctaw and Chickasaw Nations' ownership in the lands ceded to the Choctaws by the Treaty of 1820 is indisputable.

The Government had never recognized tribal ownership in the lands involved in the *Tee-Hit-Ton Indians* v. *United States*. But in the three cases now before the Court the Government not only had ceded the fee title to the lands to the Choctaw Nation by its Treaty of 1820 but it had by many subsequent treaties and Congressional Acts and administrative actions recognized the ownership of the Choctaw Nation and the Chickasaw Nation of the lands involved in these actions.[5]

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[5] See also *Choctaw Nation* v. *United States*, 119 U.S. 38, 30 L.Ed. 119; *United States* v. *Choctaw and Chickasaw Nations*, 179 U.S. 494, 508, 45 L.Ed. 291, 297, and *Fleming* v. *McCurtain*, 215 U.S. 56, 59, 54 L.Ed. 88, 91.

Furthermore, and most importantly, this Court speaking through Mr. Justice Reed said in *Tee-Hit-Ton Indians* v. *United States:*[6]

> "Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. Citing United States v. Creek Nation, 295 U. S. 103, 109, 110, 79 L.ed 1331, 1335, 1336, 55 S.Ct. 681; Shoshone Tribe v. United States, 299 US 475 497, 81 L.ed 360, 369, 57 S. Ct. 244, Chippewa Indians v. United States, 301 US 358, 375, 376, 81 L.ed 1156, 1166, 1167, 57 S. Ct. 826; United States v. Klamath & M. Tribes, 304 US 119, 82 L.ed 1219, 58 S. Ct. 799; Sioux Tribe v. United States 316 US 317, 326, 86 L.ed 1501, 1507, 62 S. Ct. 1095."

When this Court said in *Tee-Hit-Ton Indians* v. *United States that:* "No case in this court has ever held that taking title or use by Congress required compensation" it was speaking of those cases wherein the Indian tribe had only the right of occupancy. It was not speaking of those cases in which the fee title was vested in the Indian tribe.

The second proviso of Section 14 of the Act of April 6, 1906, was intended only to apply to narrow strips and gores which had no substantial value as separate tracts.

The second proviso of Section 14 of the Act of April 6, 1906 is unconstitutional if it gives to others lands owned by the Choctaw Nation and the Chickasaw Nation and which possess general utility and have substantial value as separate tracts. However, concededly, a fiduciary can abandon

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[6] 348 U.S. 277, 278.

property which is worthless or burdensome to the trust. It is assumed that in passing the second proviso Congress knew that it could not give away lands belonging to the Choctaw Nation or the Chickasaw Nation and which had substantial values as separate tracts without providing for the payment of just compensation to the tribes. On the other hand in passing the second proviso it may be assumed that Congress also knew that as guardian of the Indian tribes it could abandon worthless property and that which might be burdensome to the trust. If the application of the second proviso is limited to narrow strips and goes such as fragments of abandoned railroad rights-of-ways which have no general utility or substantial value as separate tracts, then the second proviso is constitutional.

But the court below said: "In fact, the second proviso says nothing about the size of the easement taken. We take it that Congress intended to include all railroad easements." If that construction is allowed to stand then obviously the second proviso is unconstitutional. The fiduciary power of the Government to give lands belonging to the tribes to other parties without providing for the payment of just compensation is dependent upon the value of the tract. If it has no substantial value as a separate tract the Congress has the power to give it away. If it has a substantial value as a separate tract Congress does not have that power. It cannot be gainsaid that a 200-acre tract does not have a substantial value as a separate tract or that a 40-acre tract does not hve a substantial value as a separate tract or that a 32-acre tract does not have a substantial value as a separate tract.

In *United States* v. *Magnolia Petroleum Company*, 110 F.2d 212, 217, the court below appeared to have recognized that Congress can only give away narrow strips and gores which do not possess general utility or have a substantial value as separate tracts, saying:

> "It is the general rule that the servient estate in a strip of land set apart for railway or highway right of way, or for a street, or a small area set apart for school, church, and other public purpose, passes with a conveyance of the fee to the abutting legal subdivision or tract out of which the strip or small area was carved even though no express provision to that effect is contained in the instrument of conveyance and that on the abandonment of the strip or small area of the purpose for which it was set apart and dedicated the dominant estate becomes extinguished and the entire title and estate vests in the owner of such abutting legal subdivisions or tract. * * * The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then becomes valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots."

Later in *United States* v. *Drumb*, 152 F.2d 821, 824, the court below speaking again of the Act of 1906 said:

> "The Act recognizes two classes of easements—those held by persons, associations and corporations and railroad rights of way. The former no doubt were occupied by churches, stores, schoolhouses or other buildings. They no doubt consisted of larger tracts, which possessed general utility and had substantial value as separate tracts. The law of reverter would not apply to such tracts."

The appellees assume the posture that the possibility of the termination of its easement was so remote that the burden of the easement made the land worthless; that the potential reversionary interests were actually a burden, millstones around the tribes' necks, so to speak, so that the Congress was in reality doing the tribes a favor when it cleared the deck for the termination of tribal affairs by taking away from the tribes the problem of what they might or might not do with these reversionary interests if and when the tribal existence terminated. Such a posture is *suggestio falsi.*

By 1906 the country east of the Mississippi had been webbed with railroads. It was a matter of common knowledge that, as they advanced across the continent, the railroads initially got water for the boilers of their steam engines from temporary reservoirs. But cities and towns sprang up along the railroads even as the tracks were being laid. These cities and towns soon developed their own municipal water systems and when they did the railroads abandoned the expediency of the temporary reservoirs and got the water for their steam engines from the water systems of the cities and towns.

The railroad's right-of-way might likely be permanent, and so might its station grounds, and even its stockyards. But by 1906 the country for decades had witnessed railroads abandon their reservoirs as municipal water systems became available. It was common knowledge that reservoirs were only expediencies.

Sixty years and more have now passed since the Act of 1906. All of the Five Civilized Tribes are still in exis-

tence. But for more than fifty of these sixty years the reservoirs of the railroads have been abandoned in the area of the Five Civilized Tribes. And that this would happen was forseeable in 1906 for one had only to see what the railroads have done in cities and towns which had developed municipal water systems to know that the abandonment of these reservoirs was not a remote possibility but, quite to the contrary, an almost dead certainty.

The cases now before the Court involve tracts which possessed general utility and had substantial value as separate tracts.

The cases in which the court below construed the second proviso involved only narrow strips or gores. For that reason they do not have the effect of *stare decisis* or constitute a rule of property which would control the three cases now before the Court. The question of the power of the Congress to give to abutting land owners large tracts which have a general utility and a substantial value as separate tracts had never been before the court below until the advent of the cases now at bar. The earlier decisions of the court below construing the second proviso did not in their aggregate create a rule of property which would now preclude the Choctaw Nation and the Chickasaw Nation from asserting their title to these lands. The rule is well stated at 20 Am. Jur.2d 528:

> "Where the facts are essentially different, stare decisis does not apply, for a perfectly sound principle as applied to one set of facts might be entirely inappropriate when a factual variance is introduced. Thus, a statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground,

> and still be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court or not shown to exist on the first attack."

To the same effect is *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33, 38, 97 L.Ed. 54, 58; *Radovich* v. *National Football League,* 77 Sup.Ct. 390.

As a rule of property the cases decided by the court below construing the second proviso would control only cases involving narrow strips and gores. They would not control cases involving large tracts which had general utility and substantial values as separate tracts. Indeed the first two of those cases were *United States* v. *Magnolia Petroleum Company and United States* v. *Drumb.* In each of those cases there was a forewarning that the law of reverter would not apply to large tracts which had a general utility and substantial values as separate tracts.

This Court said in its concluding paragraph to *Graves* v. *Schmidlapp,* 315 U.S. 657, 665, 86 L.Ed. 1097, 1103:

> "No interest which could be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution. See Burnett v. Coronado Oil and Gas Co., 285 U. S. 393, 406, footnote 1, 76 L.ed 815, 824, 52 S. Ct. 443, and cf. Helvering v. Mountain Producers Corp., 303 U. S. 376, 387, 82 L. ed 907, 914, 58 S. Ct. 623."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

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May, 1968

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
MAR 6 1968
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9572 — JANUARY TERM, 1968

CHOCTAW NATION AND CHICKASAW NATION, Appellants, v. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, AND DAVY C. MANER, Appellees.	Appeal from the United States District Court for the Eastern District of Oklahoma

Lon Kile for Appellants.

Streeter B. Flynn (Dan M. Welch of Rainey, Flynn, Welch, Wallace, Ross & Cooper were with him on the brief) for Appellees.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellants-plaintiffs Choctaw Nation and Chickasaw Nation, two Indian tribes, brought suit to secure possession of, quiet title to, and recover a reasonable rental for a tract of about 200 acres formerly reserved from allotment because of an easement acquired by a predecessor of the appellee, The Atchison, Topeka and Santa Fe Railway Com-

pany. The district court sustained a motion to dismiss and this appeal followed.

By virtue of the 1820 Treaty of Doaks Stand[1] and the 1830 Treaty of Dancing Rabbit Creek,[2] the Choctaw Nation acquired from the United States in fee simple a large area of land in what is now the State of Oklahoma. The Chickasaw Nation later secured a one-fourth interest in the area which embraces the land in suit.[3] The grants were to the tribes. Individual Indians had no title or enforceable right in tribal property.[4] Intolerable situations developed[5] and resulted in the appointment of the Dawes Commission to negotiate with the tribes for the extinguishment of their titles.[6] This Commission and the Choctaw and Chickasaw representatives made what is known as the Atoka Agreement which was incorporated into the Curtis Act, 30 Stat. 505, and later supplemented by a 1902 act, 32 Stat. 641, 657. This agreement provided, among other things, for the allotment of the lands to individual Indians.

The Enid and Anadarko Act of 1902[7] provided for the acquisition of railroad rights-of-way across these Indian lands and authorized the acquisition of easements by condemnation. Section 14 of that Act[8] provides in part:

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1 7 Stat. 210.

2 7 Stat. 333.

3 See Chickasaw Nation v. United States, 94 Ct.Cl. 215, 237.

4 Choate v. Trapp, 224 U.S. 665, 671.

5 Stephens v. Cherokee Nation, 174 U.S. 445, 450-451, contains an account of conditions existing in the tribal governments and refers to their corruption and irresponsibility. In Choate v. Trapp, 224 U.S. 665, 667, reference is made to the fact that the existence of an extensive area wherein private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.

6 27 Stat. 612, 645.

7 32 Stat. 43.

8 32 Stat. 47.

"And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purposes * * *."

Pursuant to this provision a predecessor of the Santa Fe acquired the land in question for reservoir purposes in 1903. The use was abandoned in 1910.

In 1906, Congress passed an act[9] to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." The Choctaws and Chickasaws are two of the Five Civilized Tribes. Section 14[10] of this Act says that lands reserved from allotment or sale under any act of Congress for the benefit of any person, corporation, or association shall be conveyed to the one entitled thereto. This is followed by two provisos. The first reads that if any reserved parcel has been abandoned before conveyance it "shall revert to the tribe and be disposed of as other surplus lands thereof." The second proviso is that railroad easements for "right of way, depot, station grounds, water stations, stock yards or other uses" may be acquired under regulations of the Secretary of the Interior and, if not so acquired and when the railroad ceases to use it for the reserved purpose, "shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part" except when the land is within a municipality.[11] The railroad did not acquire fee title to the land in dispute. The land is not

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9 34 Stat. 137.

10 34 Stat. 142.

11 These statutory provisions are herein referred to as the second proviso.

located within a municipality. Under the second proviso title, free of the easement, vests in the abutting landowner upon abandonment of the easement.

We have repeatedly given effect to the second proviso and upheld the vesture of rights in accordance therewith. In United States v. Magnolia Petroleum Co., 10 Cir., 110 F.2d 212, the history of the legislation with which we are concerned was reviewed and the vesture of railroad right-of-way in abutting landowners was uphold as against the claim asserted by the United States on behalf of the Indians that upon abandonment title passed to the Indian tribes. In United States v. Drumb, 10 Cir., 152 F.2d 821, another case concerning the Choctaws and Chickasaws, the court said: "Congress had the power to make a disposal of these contingent reversionary interests in railroad rights of way * * *." The principles announced in Magnolia and Drumb have been followed in seven other cases.[12]

The tribes say that the second proviso takes their lands without compensation in violation of the Fifth Amendment. The argument is that the tribes had fee title; that in the condemnation proceedings under the Enid and Anadarko Act whereby the railroad obtained its right, they were compensated only for the easement; and that the vesture of title in the abutting landowner takes their fee without payment.

The above mentioned Tenth Circuit decisions which recognized the validity of the 1906 Act and particularly the validity of the second proviso[13] are attacked on the ground

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[12] See Seminole Nation v. White, 10 Cir., 224 F.2d 173, cert. denied 350 U.S. 895; Chickasha Cotton Oil Co. v. Town of Maysville, 10 Cir., 249 F.2d 542; St. Louis-San Francisco Ry. v. Town of Francis, 10 Cir., 249 F.2d 546; City of Wilburton v. Swafford, 10 Cir., 253 F.2d 479; Town of Maysville v. Magnolia Petroleum Co., 10 Cir., 272 F.2d 806; Fitzgerald v. City of Ardmore, 10 Cir., 281 F.2d 717; and St. Louis-San Francisco Ry. v. Walter, 10 Cir., 305 F.2d 90.

[13] See particularly United States v. Drumb, 10 Cir., 152 F.2d 821, 823-824.

that they misconceived the holdings in Missouri, K. & T. Ry. v. Roberts, 152 U.S. 114, and Buttz v. Northern Pac. R. R., 119 U.S. 55, because those two cases related to situations where the Indians had only a right to possession and the fee was in the United States. In the cases with which this court has been concerned, and here, the fee is in the Indians by virtue of the Treaty of Dancing Rabbit Creek.[14] We see no validity in the distinction. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281, an aboriginal possession case, the Court said that: "No case in this Court has ever held that taking of Indian title or use by Congress required compensation."

Each of these tribes "was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government."[15] In Choctaw Nation v. United States, 119 U.S. 1, 27, the Court, quoting from an earlier decision, said: "These Indian tribes *are* the wards of the nation; they are communities *dependent* on the United States * * *." In exercising control and management, the United States must act in good faith and in the best interests of its wards.[16]

In making final disposition of the affairs of the tribes, Congress was faced with the problem of the vesture of title upon the abandonment of an easement. It determined that title should vest in the abutting landowners. These landowners were either Indian allottees or their successors in title. Such disposition was neither unfair to the Indians nor contrary to their best interests. The contingent right went to the individual Indians or those who held under them. The United States as guardian did not benefit from the results of abandonment.

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[14] 7 Stat. 333, Art. II.

[15] United States v. Creek Nation, 295 U.S. 103, 109.

[16] Shoshone Tribe v. United States, 299 U.S. 476, 497.

The Indians say further that the intent of the second proviso was to dispose only of narrow strips and gores and not to dispose of larger tracts such as we have here. The argument runs contrary to the language of the statutes. The Enid and Anadarko Act permitted the railroads to acquire lands for reservoirs and water stations. The second proviso covers easements for a number of uses including "water stations" and "other uses." Reservoirs are not excluded from its terms. In fact, the second proviso says nothing about the size of the easement taken. We take it that Congress intended to include all railroad easements.

This is not a suit against the United States for any breach of a fiducial duty. Instead, it is a suit to oust those who hold pursuant to a statute of the United States. The specific attack is on the second proviso but the second proviso is an integral part of the statute making final disposition of the affairs of the tribes. It cannot be separated because to do so "would be inconsistent with the purpose and intent of the statute as a whole."[17] The United States in its sovereign capacity had the power to make final disposition of the lands and in so doing did not breach any duty owed by it to the Indians. A nullification of the second proviso on the Fifth Amendment ground here asserted would be a substantial detriment to the Indian allottees and their successors in interest.[18] The efforts of Congress to effectuate the principles of the Atoka Agreement [19] would be severely affected.

Affirmed.

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17 United States v. Magnolia Petroleum Co., 10 Cir., 110 F.2d 212, 218.

18 The pertinent cases heretofore litigated in this court show that substantial economic values would be affected. See the cases cited in note 12.

19 See 30 Stat. 505 and 32 Stat. 641, 657.

[APPENDIX]

FILED
United States Court of Appeals
Tenth Circuit
MAR 6 1968
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9573 — JANUARY TERM, 1968

CHOCTAW NATION AND CHICKASAW NATION, Appellants, v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and LEE F. WHITE, O. R. SMILEY AND MAMIE SMILEY, Appellees.	Appeal from the United States District Court for the Eastern District of Oklahoma

Lon Kile for Appellants.

Streeter B. Flynn (Reuel W. Little was with him on the brief) for Appellee.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is a companion case to No. 9572—Choctaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, 10 Cir., ____F.2d____. Reference is made to the decision in that case for the pertinent treaties and statutes.

The land in question is a 32-acre reservoir tract reserved from allotment because of an easement obtained for

reservoir purposes by a predecessor of the appellee railway company in 1903. The complaint alleges an abandonment in 1910 and a conveyance to the Choctaw Nation and the Chickasaw Nation by the railroad in 1946. The answer and cross-claim of the appellees Lee F. White, O. R. Smiley, and Mamie Smiley, abutting landowners. allege abandonment in 1946. The railroad filed a disclaimer. The district court sustained a motion of the other appellees to dismiss.

In Choctaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, supra, we held that upon abandonment of the reservoir easement, title vested to the abutting landowners. The same principle applies here whether the abandonment occurred in 1910 or 1946. The conveyance to the two Nations was a nullity because the railroad had nothing to convey.

Affirmed.

[APPENDIX]

FILED
United States Court of Appeals
Tenth Circuit
MAR 6 1968
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9574 — JANUARY TERM, 1968

CHOCTAW NATION AND CHICKASAW NATION, Appellants, v. C. G. SHULL, JR., AND RUBY MAE SHULL, PHOEBE JO SHULL now JONES, and J. B. JONES, GEORGE E. SHELTON AND WYNONA A. SHELTON, HAL WELCH, AND JOE WELCH, Appellees.	Appeal from the United States District Court for the Eastern District of Oklahoma

Lon Kile for Appellants.

Hal Welch for Appellees.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is another case like Choctaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, 10 Cir., ____ F.2d____, to which reference is made.

Here we are concerned with a tract about 40 acres in size on which the St. Louis & San Francisco Railway Com-

pany obtained a reservoir easement in 1902. The appellees-defendants are abutting landowners. The railroad abandoned the easement at some unstated date. In 1955 some of the appellees obtained a judgment against the successor to the original holder of the easement in which it was found that the reservoir use had been abandoned. The trial court granted a summary judgment in favor of the abutting landowners.

This case is controlled by Choctaw Nation v. The Atchison, Topeka and Santa Fe Railroad Company, supra. On the abandonment of the easement, the title vested in the abutting landowners.

Affirmed.